Supreme Court, U.S.
FILED

98 430 SEP 14 1998

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

PARENT-GUARDIAN ASSOCIATION OF ARLINGTON DEVELOPMENTAL CENTER,
Petitioner,

v.

PEOPLE FIRST OF TENNESSEE,
on behalf of its members, et al.;

ARLINGTON DEVELOPMENTAL CENTER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. BURKE,
Counsel of Record
BURKE & STONE
400 MADISON AVENUE
NEW YORK, NY 10017
(212) 752-5353

WILLIAM F. SHERMAN
ATTORNEY AT LAW
504 PYRAMID PLACE
221 WEST SECOND STREET
LITTLE ROCK, AR 72201
(501) 372-3148

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

306 pp

QUESTIONS PRESENTED

This action involves the undisputed habilitation rights of certain severely disabled citizens of Tennessee. Remedies conflict. Over objection, class action status was granted to proponents of one remedy.

For those suffering severe disability, specialized services; constant monitoring, and ready availability of medical attention are mandatory. Some parties, including the parents and guardians of the disabled individuals, submit that an institution is a necessary option for the provision of such continuous care. "Next friends" and an advocacy group, plaintiffs herein, favor placement of all disabled in the community and elimination of the institutional service option.

Over opposition of the parents and guardians, the advocacy group was certified as the sole class representative.[1] Upon these facts:

1. Was class representation improperly granted to an advocacy group, claiming the right to litigate and decide for all members of a class of severely disabled individuals, when an intervening party representing parents and guardians of class members advocated a contrary interest?

2. Was class action status otherwise proper to determine the First Amendment associational rights of institutionalized, severely disabled individuals, or did the lower courts impermissibly enter and resolve a political, medical and social debate over provision of services in an institutional setting by granting class status to one proponent, and by approving the settlement of institutional closure advocated by that proponent?

---

[1] Subclasses were not created. See FRCP 23(c)(4)(B).

LIST OF PARTIES

1. The parties not listed in the caption are as follows:

Petitioner: (PARENT-GUARDIAN ASSOCIATION OF ARLINGTON DEVELOPMENTAL CENTER)

Respondents: (1) (ARLINGTON DEVELOPMENTAL CENTER); NED MCWHERTER; MONA REEVES-WINFREY, sued in her official capacity as superintendent of Arlington Developmental Center; MENTAL HEALTH, TN; EVELYN C. ROBERTSON, JR., sued in his official capacity as commissioner of Mental Health and Mental Retardation; MARJORIE NELLE CARDWELL; TENNESSEE HEALTH DEPARTMENT; RUSSELL WHITE, sued in his official capacity as commissioner of Health; MANNIE MARTIN, sued in his official capacity as director of bureau of Medicaid; TENNESSEE DEPARTMENT OF HUMAN SERVICES; ROBERT GRUNOW, sued in his official capacity as commissioner of Human Services; BETTY GAYLE, sued in her official capacity as assistant commissioner for social Services; PATSY MATTHEWS, sued in her official capacity as assistant commissioner for Rehabilitation Services.

Respondents: (2) (PEOPLE FIRST OF TENNESSEE) Carl Beard, nfr Wendy Kurland; SANDRA HOWARD; HERMAN

WALTER RUNIONS, nfr Sarah R. Todd; HARVEY RICHARD WATSON, nfr Bonita Scott; CLARENCE WILSON, nfr Wilma Williamson; STEVELYN DANIEL TUCKER; KEITH COLLINS.

2. Petitioner-intervenor Parent-Guardian Association of Arlington Developmental Center has no parents or subsidiaries.

3. All defendants are either agencies or officers of the State of Tennessee, sued in their official capacities.

4. The lead plaintiff, People First of Tennessee, is a nonprofit organization advocating closure of institutions. Other organizations similarly named (e.g., "People First of the United States"; "People First of Washington, Inc.") exist nationwide, with similar goals. Petitioner is unaware whether People First of Tennessee has a parent or subsidiaries.

5. The remaining plaintiffs are seven individual residents of Arlington Developmental Center, represented by "next friends".

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

CITATIONS BELOW 1

JURISDICTIONAL BASIS 3

STATEMENT OF THE CASE 4

1. Overview 4
2. The People First Claims 5
3. Arlington PGA's Intervention 6
4. Parallel Developments 6
5. Resolution of the Merits 7
   - A. The Due Process 7
   - B. The First Amendment 8
6. Class Action Issues 9
7. On Appeal 11

SUMMARY OF ARGUMENT 12

ARGUMENT 14

I. AS AN ADVOCATE WHOSE INTEREST CONFLICTED WITH A PORTION OF THE PROPOSED CLASS, PEOPLE FIRST SHOULD NOT HAVE BEEN APPOINTED CLASS REPRESENTATIVE, AND THE

CLASS SHOULD NOT HAVE BEEN CERTIFIED 14
1. The National Debate 15
2. The Competing Interests 16
3. The Court's Precedent 18

II. APPROVAL OF THE CLASS ACTION SETTLEMENT MUST BE VACATED 23

CONCLUSION 25

APPENDIX

Appendix A
Order Granting Motion to Stay Mandate, 7/16/98 . . . . . 1a

Appendix B
Order Denying Petition for Rehearing, 7/1/98 . . . . . 3a

Appendix C
Sixth Circuit Opinion, No. 97-5232, 5/7/98 . . . 5a

Appendix D
District Court Judgment, 1/6/97 . . . . . 16a

Appendix E
District Court Order Approving Settlement of Class Action, 1/6/97 . . . . . 18a

Appendix F
District Court Order on Notice of Proposed Settlement of Class Action Lawsuit, 8/15/96 . 31a

Appendix G
District Court Order Denying Intervenor's Motions to Change Status and to File a Complaint, 3/21/96 . . . . . 42a

Appendix H
District Court Order Granting Class Certification, 9/27/95 . . . . . 45a

Appendix I
District Court Order Granting Motion to Enter Findings and to Intervene, 9/27/95 . . . . . 68a

Appendix J
District Court Order Staying Proceeding, 9/29/94 . . . . . 75a

Appendix K
District Court Order on Motion to Dismiss, 1/26/93 . . . . . 77a

Appendix L
Findings of Fact in USA v. State of Tennessee 88a

Appendix M
District Court Supplemental Findings of Fact 125a

Appendix N
District Court Remedial Order, 9/2/94 . . . . 166a

Appendix O
Federal Rule 23 of Civil Procedure 223a

Appendix P
Excerpts From Deposition of William Knaus 227a

Appendix Q
Colloquy 238a

Appendix R
Orders in Washington Case No.
C96-5906FDB 240a

Appendix S
Department of Justice Letter of Finding 246a

Appendix T
District Court Stipulation of Voluntary
Dismissal 268a

TABLE OF AUTHORITIES

Page

Cases

Amchem Products, Inc. v. Windsor,
521 US --, 117 S.Ct. 2231,
138 L.Ed. 2d 689 (1997) 11, 13, 20-23

Appleyard v. Wallace,
754 F.2d 955, 958 (11 Cir. 1985) 19

DeShaney v. Winnebago County Department
of Social Services,
489 US 189 (1989) 24

Eisen v. Carlisle & Jacquelin,
417 US 156 (1974) 12, 14

Flanagan v. Ahearn,
134 F.3d 668 (5 Cir. 1998) 13

General Telephone Company of the
Northwest, Inc. v. EEOC,
446 US 318 (1980) 19

General Telephone Company of the
Southwest v. Falcon,
457 US 147 (1982) 20

Gilpin v. AFSCME, AFL-CIO,
875 F.2d 1310 (7 Cir. 1989) 19

Gulf Oil Co. v. Bernard,
452 US 89, 100 (1981) 10, 11

Hansberry v. Lee,
311 US 32, 45 (1940) 19

Heller v. Doe,
509 U.S. 312, 333 (1993) 16, 18

In re American Medical Systems, Inc. (Pfizer, Inc.)
75 F.3d 1069 (6 Cir. 1996) 19

In re Joint Eastern and Southern
District Asbestos Litigation
982 F.2d 721 (2 Cir. 1993),
993 F.2d 7 (on rehearing) 19

Oritz v. Fibreboard Corp.,
-- US --, 141 L.Ed. 2d 71,
-- S.Ct. -- (June 22, 1998) 13

People First of Washington, Inc. v.
Rainier Residential Habilitation Center, et al.,
N. C 96-5906 FDB (W.D. WA:
May 1, 1997) 15, 16

Scott v. Haworth,
916 F.2d 134, 145 (4 Cir. 1990) 19

Smith v. Babcock,
19 F.3d 257 (6 Cir. 1997) 19

United States of America v.
State of Tennessee, et al.,
No. 92-2062 M1/A (USDC, WD Tenn.) 4

Weaver v. University of Cincinnati,
970 F.2d 1523 (6 Cir. 1992) 19

Youngberg v. Romeo,
457 US 307, 324 (1982) 24

Statutes and Rules

28 USC § 1254(1) 3

28 USC § 1343(a) 4

42 USCA § 1997 24

Federal Rule of Civil Procedure 17(c) 8

Federal Rule of Civil Procedure 23 . . . . 3, 11, 18, 20, 21

U.S. Constitution and other Authorities

US Constitution, Amendment I 3, 5, 9, 23

US Constitution, Amendment XIV 3, 5

Americans with Disabilities Act, Title II 5

Rehabilitation Act of 1973, §§ 100, 504 5

Title XIX of Social Security Act 5

CITATIONS BELOW[2]

1. This petition: No. 97-5232 (6 Cir.; May 7, 1998), unpublished pursuant to Rule 24 of the United States Court of Appeals for the Sixth Circuit (App. at 5-15a); rehearing denied, July 1, 1998 (App. at 3-4a).

   No. 92-2213 M1/V (USDC, WD Tenn.; Jan. 6, 1997), unpublished, entitled "Order Approving Settlement of Class Action", and judgment thereunder (App. at 16-30a);

   No. 92-2213 M1/V (USDC, WD Tenn.; Mar. 21, 1996), unpublished order denying procedural relief (App. at 42-44a);

   No. 92-2213 M1/V (USDC, WD Tenn.; Sept. 27, 1995), unpublished, entitled "Order Granting Motion To Enter Findings From 92-2062 In This Case..." (App. at 68-74a); and

---

[2] Six years of bitter litigation in two related cases have produced dozens of opinions and orders. None has been published to date. Petitioner limits this list to the pertinent opinions and orders set forth in the Appendix.

No. 92-2213 M1/V (USDC, WD Tenn.; Sept. 26, 1995), unpublished, entitled "Order Granting Class Certification" (App. at 45-67a).

2. This case: No. 92-2213 M1/V (USDC, WD Tenn.), orders dated: Aug. 15, 1996 (notice to class; App. at 31-41a); Sept. 30, 1994 (stay of proceedings; App. at 75-76a); May 13, 1994 (consent dismissal), and Jan. 26, 1993 (on motion to dismiss; App. at 77-87a).

3. Related case: United States of America v. State of Tennessee, et al., No. 92-2062 M1/A (USDC, WD Tenn.; Aug. 21, 1997), unpublished, entitled "Order on Community Plan For West Tennessee", and trial findings therein, dated Nov. 22, 1993 (App. at 88-124a) and Feb. 14, 1994 (App. at 125-165a); appeal pending.

JURISDICTIONAL BASIS

Petitioner seeks review of an order of the United States Court of Appeals for the Sixth Circuit, entered 7 May 1998. (App. at 5-15a.) A petition for rehearing under FRAP 40(a), with a suggestion for rehearing en banc under FRAP 35, was denied on 1 July 1998. (App. at 3-4a.)

The basis of this Court's subject matter jurisdiction is 28 USC § 1254(1).

Statutes Involved

FRCP 23, reproduced in Appendix at 223a.

US Constitution, Amendment I:

> "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble...".

US Constitution, Amendment XIV, § 1:

> "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law...".

STATEMENT OF THE CASE

1. Overview

The essence of this litigation is an attempt by an advocacy group to use the federal courts to close the Arlington Developmental Center ("ADC").

ADC is a state-owned Tennessee facility providing services in an institutional setting for developmentally disabled individuals. Upon years of first-hand experience monitoring the care of disabled family members, petitioner, the Parent-Guardian Association of ADC ("Arlington PGA"), supports strengthening services at ADC and opposes closure. Arlington PGA also supports improvements in the Tennessee community placement system for those disabled individuals who choose, and qualify for, such placement.

The first step to closure was an investigation by the United States Department of Justice ("DOJ"), which resulted in an unfavorable Letter of Finding to Governor McWherter on 12 March 1991. (App. at 246-267a.) Plaintiff People First of Tennessee ("People First"), self-described as "a statewide advocacy organization governed by people with disabilities" (Appellee's Brief to the Sixth Circuit ["PF Br."], p. 2), then "became keenly interested in problems at Arlington"; retained counsel, and filed this class action in December, 1991, under 28 USC § 1343(a). (Ibid.) A DOJ action, United States of America v. State of Tennessee, et al., No. 92-2062 M1/A (USDC, WD Tenn.), followed one month later ("DOJ Action").

The DOJ Action went to trial in 1993, and resulted in due process findings unfavorable to Tennessee; a remedial

order, and an approved remedial plan. The DOJ Action is now on appeal.

This action (No. 92-2213 M1/V at the District Court) only went to judgment in January, 1997, but has preceded the DOJ Action up the appellate track and to this Court.

2. The People First Claims

Filing their claims as a class action, People First asserted that Tennessee had denied five residents of Arlington DC "minimally adequate living arrangements, habitation and services". (PF Br., pp. 2-3.) Claims were pleaded under various federal statutes[3], the Fourteenth Amendment, and the First Amendment. Arlington DC, Governor McWherter, and eleven other Tennessee officials or agencies were named as defendants (collectively, "Tennessee").

In January, 1993, upon Tennessee's motion, the District Court dismissed all statutory claims; claims under the Equal Protection clause of the Fourteenth Amendment, and three of plaintiff's First Amendment claims. (App. at 77-87a.) This dismissal was never appealed. Remaining Equal Protection claims and a procedural due process claim were voluntarily dismissed in May, 1994. (App. at 268-269a.)

Only the remaining two claims on the merits are pertinent to this petition: denials of associational rights under the First Amendment, and denials of due process rights to care and services under the Fourteenth Amendment.

---

[3] Title XIX of the Social Security Act; Rehabilitation Act of 1973, §§ 100 and 504; Americans with Disabilities Act, Title II.

3. Arlington PGA's Intervention

People First claimed class action status, purporting to speak for everyone who ever resided at ADC "on or after December 12, 1989"; current residents, and "all persons at risk of being placed at Arlington in the future". (App. at 49a, n. 4.)[4] Tennessee opposed. Arlington PGA was permitted to intervene to oppose closure and class status, and was aligned as a defendant.

This action then paused, in view of developments in the related DOJ Action.

4. Parallel Developments

At this point, the DOJ Action was far more advanced, and had proceeded without Arlington PGA.[5] It was tried in the fall of 1993, and resulted in detailed findings (App. at 88-165a), which the District Court later summarized as follows:

> "[C]onditions at Arlington did not meet minimally adequate constitutional standards and, therefore, defendants were found to have violated the due process rights of residents at Arlington Developmental Center." (App. at 70a.)

---

[4] In addition to its claim of class representation, individual members of People First also sought to appear as a "next friend" to five ADC residents under FRCP 17(c).

[5] Arlington PGA was granted a very limited right "to attend depositions and receive documents" in the DOJ action. (App. at 73a, n. 4.)

The trial result of the DOJ Action (essentially a judgment on liability) was not appealed. A remedial order was entered therein on Tennessee's limited consent on 2 September 1994 (App. at 166- 222a), and implemented thereafter.

In this action, all proceedings were temporarily stayed to consider the effect of the remedial order entered in the DOJ Action, including the Court's suggestion "to have the case dismissed without prejudice". (App. at 76a.) People First chose to press on with this litigation. (App. at 45-47a, n. 1.)

5. Resolution of the Merits

A. The Due Process Claim

On 27 September 1995, the District Court granted collateral estoppel effect to the liability findings in the DOJ Action, and to the remedial order entered therein. It then concluded that People First's due process claim was thereby determined, and entered a final order granting that claim. (App. at 68-72a.)

The Court did so over the objection of Tennessee. Having conceded identity of issue (App. at 68-69a, n. 1), and unable to contest its presence in both litigations, Tennessee's objection to offensive collateral estoppel was doomed to failure. (App. at 71a.)[6]

---

[6] Ironically, the same order belatedly granted full intervenor status to Arlington PGA in the DOJ Action, as to remedy alone; its separate objection was overruled. (App. at 72-74a.)

B. The First Amendment Claim

As People First and Arlington PGA prepared to try the First Amendment claim, Tennessee promptly folded. Without support in the record, Tennessee agreed that ADC residents "were prevented from communicating, associating and assembling with persons of their choice". (App. at 37a, ¶ 1.) Tennessee further agreed to remedy its conduct by "developing a policy" concerning communication; by "telling the staff...about the policy"; by disciplining violations; by giving outside organizations "reasonable opportunity to communicate with residents", and by "allowing residents the opportunity to participate in community activities". (App. at 37-38a, ¶ 2.) No monetary or injunctive relief was ordered.

Arlington PGA and ComCare Inc., a court-appointed guardian, objected. (App. at 49a, 57-62a.) Arlington PGA's objection was noted in the order for notice to the class (App. at 28a), but nowhere appeared in the text of the notice (App. at 35-41a).

Arlington PGA objected on grounds of collusion; absence of evidence of First Amendment violations; interference with the rights and duties of parents and guardians "to represent and speak for their children and wards"; apparent unlimited access of strangers to a previously protected environment, and difficulties with the term "discourage". (App. at 28-29a.)[7]

---

[7] ComCare joined in most of these grounds. (App. at 28-29a.) Arlington PGA's objection was supported by 137 declarations. (App. at 52-53a, n. 6.) People First's position was supported only by representatives of the seven individual plaintiffs, appointed as "next friends" under FRCP 17(c). (19a; 47-48a; 78a.)

The District Court observed:

> "[T]he Court recognizes the thoughtful and heartfelt concern expressed by the parents and guardians of the residents of Arlington Developmental Center...". (App. at 29a.)

Nevertheless, their objections were swept aside. (App. at 28-29a.) Without citation of authority, the District Court concluded:

> "Moreover, even assuming that there were no First Amendment violations, this does not change the fact that the agreement is fair, adequate and reasonable." (App. at 26-27a; emphasis added.)[8]

6. Class Action Issues

Two issues were raised here. Tennessee objected to class definition. Arlington PGA pointed to the irreconcilable difference over remedy within the purported class: community placement, or continued specialized services in an institutional setting. (See App. at 227-237a). The District Court stayed the motions as possibly moot in view of the relief granted in the DOJ Action. (App. at 75-76a; see 3, above.) Upon People First's urging (App. at 45-47a, n. 1), the Court pressed on to decision on 26 September 1995.

---

[8] Petitioner would substitute "collusive". We have little doubt that People First will seek "prevailing party" fees from the public fisc of Tennessee for this First Amendment "victory" unless this Court reverses.

The District Court found two factual areas justifying class status: "Whether defendants are providing constitutionally adequate habilitation", and "whether defendants are prohibiting residents from associating with certain individuals". (App. at 59a.)

The District Court also expressly found this conflict:

> "[L]ack of consent by parents and guardians for the participation of their sons, daughters and wards in the litigation...". (App. at 60a.)

Despite this obvious division of interest within the proposed class, the District Court overruled the objections of Arlington PGA and Tennessee; certified the class, and appointed People First as sole class representative. (App. at 42-67a.) It concluded that the objections of the parents and guardians were irrelevant, and that People First was free to be the class representative despite its commitment to institutional closure. (App. at 50-65a.) This finding was most explicit:

> "In making such a determination, the Court is mindful that, to the extent that the views and goals of the parents and guardians are in conflict with those of [the class representative], those views or goals appear to be adequately represented by [Arlington PGA]...." (App. at 64a.)

The option of subclasses, with a neutral class representative, was not offered.[9]

---

[9] Subclass creation and definition is a matter of court administration, not party objection. Gulf Oil Co. v. Bernard, 452

On 7 January 1997, the objections were overruled, and final judgment was duly entered. (App. at 16-17a.)

7. On Appeal

Only Arlington PGA appealed. Primary stress was placed on the propriety of People First as the sole class representative, given the antagonism of interests. Approval of the settlement of the First Amendment association claim was also appealed, as was the due process disposition.[10]

On 7 May 1998, the Court of Appeals affirmed in all respects, in an unpublished per curiam opinion. (App. at 5-15a.) On class action issues, it concluded that the District Court did not abuse its discretion in concluding that the four threshold requirements of FRCP 23(a) were met, as well as those of FRCP 23(b)(2). (App. at 11-13a.) The Court of Appeals made this astonishing conclusion of fair and adequate protection under FRCP 23(a)(4):

> "[T]here was no evidence that People First had interests that were antagonistic to those of the

---

US 89, 100 (1981); Amchem Products, Inc. v. Windsor, 521 US --, at --; 117 S. Ct. 2231, at 2248-9; 138 L. Ed. 2d 689, at 710-2 (1997).

[10] Arlington PGA also appealed a procedural order denying leave to cross-claim against Tennessee, which would have alleged inadequacies in the community care system and would have sought to keep ADC open. (App. at 42-44a.) The Court of Appeals found no abuse of discretion. (App. at 14a.)

other residents." (App. at 12a; citation omitted; emphasis added.)[11]

The Court of Appeals also found no abuse of discretion in the District Court's approval of the settlement of the First Amendment claim, under a cost of litigation rationale and a broad construction of its access terms. (App. at 13-14a.) It also held that only Tennessee was affected by the due process disposition, denying Arlington PGA's standing to object. (App. at 14-15a.)

Rehearing, and a suggestion for rehearing en banc, were each denied on 1 July 1998. (App. at 3-4a.)[12] The mandate was stayed until 31 August 1998 to permit this petition (see App. at 1-2a); a supplemental motion to stay until 15 September 1998 is pending.

Summary of Argument

Petitioners present two independent reasons for the grant of certiorari in this case.

---

[11] Such evidence appears throughout the District Court's opinions. (See, e.g., App. at 28-29a; 63a.)

[12] We hope that the Court of Appeals did so in the spirit of another significant class action case, Eisen v. Carlisle & Jacquelin, 479 F. 2d 1005 (2 Cir. 1973). For five judges of the Second Circuit, Judge Kaufman observed:

> "I vote against en banc, not because I believe this case is unimportant, but because the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction." (479 F. 2d at 1020.)

As a matter of class action administration, a Court of Appeals has disregarded last year's decision in Amchem Products, Inc. v. Windsor, 521 US --, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) ("Amchem"), and its predecessors.[13] It was completely inappropriate to appoint People First as the class representative in view of its judicially-found conflict of interest with members of the class. (Point I, below.)[14]

Although couched in constitutional and class action terms, the claims below are really political and nonjusticiable. The core issue is whether institutions may continue to serve the disabled community as one care option. That issue is governmental only. (Point II, below.)

---

[13] The then-new Amchem decision was attached to Arlington PGA's reply brief at the Court of Appeals, and was argued as a basis for rehearing. (Brief in Support of Petition for Rehearing, Point I[C].)

[14] This Court has granted certiorari for October 1998 term to review a case challenging one aspect of Amchem, the propriety of class action certification in a "limited fund" mass tort context. Ortiz v. Fibreboard Corp., -- US --, 141 L. Ed. 2d. 711, -- S. Ct. -- (June 22, 1998), granting review to Flanagan v. Ahearn, 134 F. 3d 668 (5 Cir. 1998). This petition presents a similar challenge to Amchem: adequacy of representation when interests conflict. Indeed, the mutually exclusive remedies sought here present an even clearer conflict than in Ortiz, supra.

ARGUMENT

I. AS AN ADVOCATE WHOSE INTEREST CONFLICTED WITH A PORTION OF THE PROPOSED CLASS, PEOPLE FIRST SHOULD NOT HAVE BEEN APPOINTED CLASS REPRESENTATIVE, AND THE CLASS SHOULD NOT HAVE BEEN CERTIFIED.

The class was broadly defined by the District Court:

> "[A]ll persons who, on or after December 12 1989, have resided, or are residing, at the Arlington Developmental Center;
>
> [A]ll persons who have been transferred from Arlington Developmental Center to other settings, such as intermediate care facilities or skilled nursing facilities, but remain defendants' responsibility, and
>
> [A]ll persons at risk of being placed at Arlington Developmental Center." (App. at 65a; paragraphing and punctuation added.)

The first two categories covered at least 423 people (App. at 50a); the third potentially reaches the entire population of Tennessee. A class as elastic as this has not previously met this Court's approval. See Eisen v. Carlisle & Jacquelin, 417 US 156 (1974).

What gives this case particular interest is the national debate over the appropriate treatment of severe disability. A spectrum of care is available, ranging from full rehabilitation

and return to the community, through the intermediate step of group homes, up to continued institutionalization of the incurable.

There are many colors in that spectrum. The Court of Appeals made it monochromatic by selecting one to represent all.

1. The National Debate

This petition concerns degrees of disability, and the differences in appropriate treatment of disability. Community placement or group homes may well be an effective option for those whose disabilities are less severe. For many of the severely disabled, however, provision of services and continuous care in an institution is the best (or only) possible choice; their very lives may depend on it.

The essence of the problem was captured in People First of Washington, Inc. v. Rainier Residential Habilitation Center, et. al., No. C 96-5906 FDB (W.D. WA, 1997):[15]

> "FOR explains that there is 'a great debate' in this country about how to best treat, care for, and accommodate the mentally retarded and developmentally disabled. On one side are those who say that large, institutionalized care is inhumane, unnecessarily restrictive, and violative of human rights, and that all

---

[15] The lead respondent herein is "People First of Tennessee". Petitioner Arlington PGA is situated similarly to intervenor Friends of Rainier, Inc. ("FOR") in the Washington litigation.

> developmentally disabled persons should be placed in small, community based programs. On the other side are those who say that a 'continuum' of care is more appropriate, that is, that while some disabled persons can function in community settings, others are so severely disabled that, for them, an institution with centralized, constant protection and care is a better alternative. FOR acknowledges that on both sides are experts, examples of failure, and families with difficult choices and hard feelings." (App. at 240-245a.)

Arlington PGA speaks for those people who are so disabled that their least restrictive alternative is institutionalization. People First favors community placement and institutional closure.

2. The Competing Interests

Arlington PGA's interest is distinct from -- indeed, opposed to -- that of People First.[16] As Judge Burgess' sensitive opinion in People First of Washington, supra, shows, neither side has a monopoly on correctness; the choices are agonizing.

---

[16] The Supreme Court has expressly recognized the separate interests of parents and guardians, amply warranting intervention and presentation of their unique prospective. Heller v. Doe, 509 U.S. 312, 333 (1993). Arlington PGA represents over 200 families with a resident at ADC, a clear majority.

But there are choices. Different interests support different choices. No one interest may be the class representative.

Each competing interest made a clear record. Arlington PGA's inclusion of institutionalization as an important option was supported by expert testimony. (App. at 227-237a.)[17] People First adopted a position antagonistic to that of Tennessee and Arlington PGA.[18] It bluntly opposed Arlington PGA's support for ADC, as follows:

> "Appellees simply contend that...the parents' failure or refusal to raise the constitutional claims of their sons, daughters and wards, make it appropriate, in this proceeding, that

---

[17] Families representing 137 ADC residents submitted declarations in opposition to class certification demonstrating the unique needs of each resident. (App. at 52a, n. 6.) Together with the expert testimony submitted, an abundant record was created on the issue of conflict.

[18] "People First of Tennessee became keenly interested in problems at Arlington in March 1991, when the [DOJ] issued a Letter of Finding to Governor Ned McWherter informing [him] that DOJ had found a pattern of serious violations of Arlington residents' constitutional rights. After the Letter of Finding was issued, People First convened a special board meeting to discuss the findings.... At the special board meeting, after discussion of the findings, a motion was made and carried by the board...to discuss litigation. This lawsuit followed." (PF Brief, p. 2.)

> those claims be raised by the named appellees...". (PF Brief, pp. 20-21.)[19]

In describing these interests, this Court has correctly stated:

> "We deal here with issues of unusual delicacy, in an area where professional judgments regarding desirable procedures are constantly and rapidly changing." (Heller v. Doe, supra n. 16, loc. cit.)

People First seeks to downsize, and then close, ADC. Arlington PGA seeks to preserve ADC as an option for the many disabled persons who need that institution open.

This is a record of competing interests. No single class could arise from it.

3. This Court's Precedent

Arlington PGA submits that the sharply differing interests of People First and itself fail to satisfy the "commonality" test of FRCP 23(a)(2); the "typicality" requirement of FRCP 23(a)(3); the conflict of interest aspect of the adequacy of representation requirement of FRCP 23(a)(4), and the class definition of FRCP 23(b)(2) under the

---

[19] From the parents' perspective, this is the cant of an officious intermeddler. A final judgment ends an advocacy group's involvement with these disabled individuals. Their parents and guardians must cope with the resulting service system, day by fearful day.

established precedent of this Court. The contrary decision below should be rejected.[20]

The issue rises to the level of a denial of procedural due process. Selection of a class representative "whose substantial interests are not necessarily, or even probably, the same as those [whom] they are deemed to represent" violates due process. Hansberry v. Lee, 311 US 32, 45 (1940).

In General Telephone Company of the Northwest, Inc. v. EEOC, 446 US 318 (1980), this Court noted:

> "[T]he adequate representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class." (446 US at 331.)

This Court plainly concluded there that, when represented groups compete: "[t]he same plaintiff could not represent these classes." (Ibid.)

---

[20] The prior precedent of the Sixth Circuit was orthodox. See, e.g., In re American Medical Systems, Inc. (Pfizer Inc.), 75 F. 3d 1069 (6 Cir. 1996); Smith v. Babcock, 19 F. 3d 257 (6 Cir. 1994), and Weaver v. University of Cincinnati, 970 F. 2d 1523 (6 Cir. 1992). The aberrant decision below conflicts with precedent in other circuits. See, e.g., In re Joint Eastern and Southern District Asbestos Litigation, 982 F. 2d 721 (2 Cir. 1993) and 993 F. 2d 7 (on rehearing); Scott v Haworth, 916 F. 2d 134, 145 (4 Cir. 1990); Gilpin v. AFSCME, AFL-CIO, 875 F. 2d 1310 (7 Cir. 1989), and Appleyard v. Wallace, 754 F. 2d 955, 958 (11 Cir. 1985).

In General Telephone Company of the Southwest v. Falcon, 457 US 147 (1982), this Court noted the same difficulty:

> "The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining...whether the named plaintiffs' claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements also tend to merge with the adequacy-of-representation requirement, although the latter...also raises concerns about...conflicts of interest...". (457 US at 157, n. 13.)

Very closely on point is Amchem, supra, an asbestos litigation case. A well-intentioned group achieved a national settlement conditioned upon class certification. Construing both challenges made here (typicality and adequacy), this Court rejected the class certification:

> "Settlement, though a relevant factor, does not inevitably signal that class action certification should be granted more readily than it would be were the case to be litigated....[P]roposed settlement classes sometimes warrant more, not less, caution on the question of certification." (521 US at ___, n. 16; 138 L. Ed. 2d at 711; 117 S. Ct. at 2248.)

> "[FRCP 23(a) and (b)] focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by

> decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed." (521 US at __; 138 L. Ed. 2d at 711, 117 S. Ct. at 2248; emphasis added.)
>
> "[N]amed parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned." (521 US at __; 138 L. Ed. 2d at 714; 117 S. Ct. at 2251.)

Given the sharp contrast between the interests of Arlington PGA and People First, neither could represent the class as defined here.[21] The class itself covered over 423 individuals, and countless others "at risk of being placed at Arlington Developmental Center". Within this boundless class of individuals, there existed diverse medical conditions, disabilities, and behavioral complexities. As this court observed in Amchem:

> "The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse

---

[21] The panel based certification "in part" on FRCP 23(b)(2). Upon Amchem's discussion, we submit that the only applicable "class type" rule is FRCP 23(b)(3), which requires both a predominance of class issues over individual issues and an opportunity for dissenters to opt out. No such opportunity was offered here. In any event, this case does not meet the threshold requirements of FRCP 23(a)(2-4).

groups and individuals affected." (521 US at _; 138 L. Ed. 2d at 715; 117 S. Ct. at 2251.)

This Court should correct the Court of Appeals' deviation from Amchem, supra; deny class action status, and remand for further proceedings.

II. APPROVAL OF THE CLASS ACTION SETTLEMENT MUST BE VACATED.

As in Amchem, supra, denial of class action status would also vacate the settlement of First Amendment claims made below. Whether individuals choose to settle on those terms, or any other, would be a matter for remand.

In this context, we must note that no proof of First Amendment violations was ever presented.[22] The District Court actually acknowledged:

> "[I]t may well be that [only] a fairly small number of people will be in a position to really exercise those [First Amendment] rights...". (App. at 239a.)

The rights involved are associational. Arlington PGA members were never denied access to their children. The primary complaint was by an outside interest group, claiming to "know better".[23] Those prejudiced by the settlement were Arlington PGA and the disabled residents, for whom People First was permitted to make life and placement decisions.

Indeed, we suggest that the core issue involved is political, rather than justiciable. Institutionalized individuals are clothed with due process protections under, e.g.,

---

[22] At oral argument of this appeal on 10 March 1998, Tennessee continued to assert that there were no violations. At the settlement hearing below, the District Court precluded inquiry into alleged violations. It seems apparent that the State agreed to settle to save costs and end the litigation.

[23] PF Brief, pp. 20-21.

Youngberg v. Romeo, 457 US 307, 324 (1982), and DeShaney v. Winnebago County Department of Social Services, 489 US 189, 200-1, nn. 8-9 (1989). To the extent, however, that the People First organizations pursue the objective of institutional closure as "next friends" to the disabled, a different agenda appears.

The United States has the unquestioned right to seek relief under CRIPA[24], as it did in the DOJ Action. The people of Tennessee may, through their elected officials or their own vote, determine to open or close health facilities in their state. People First is neither of these.

As an amicus curiae, People First has whatever limited role a court may permit in a litigation between real parties. (See this Court's Rule 37.1.) It may not, however, create a litigation by copying the DOJ Action through the guise of a "next friend" pleading when the natural "next friends" of a disabled adult, the parents or guardians, see no difficulty, and raise no alarm.

---

[24] Civil Rights of Institutionalized Persons Act, 42 USCA § 1997.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Dated: New York, New York
September 11, 1998

Respectfully submitted,

/s/_____
WILLIAM J. BURKE, ESQ.
Counsel of Record for Petitioner
BURKE & STONE
400 Madison Avenue
New York, New York 10017
(212) 752-5353

/s/_____
WILLIAM F. SHERMAN, ESQ.
Co-counsel to Petitioner
221 West Second Street
504 Pyramid Place
Little Rock, Arkansas 72201
(501) 372-3148